No. 10333

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor, and Mount Gaines Mining Company (a corporation), Debtor,

Appellant,

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,

Appellees.

BRIEF OF APPELLEES, BYRON HALVERSON AND JOSEPH J. MUELLER.

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As we view it, there are only two questions involved in this case:

(1) DOES THE OPTION BY ITS TERMS REQUIRE THE DOWN PAYMENT OF $10,000.00 TO EFFECTUATE ITS EXERCISE?

(2) SHOULD IT BE SO CONSTRUED?

(a) By reason of practical construction.

(b) Waiver and Estoppel.

(c) Laches.

I.

If the Option by Its Terms Required the Down Payment of $10,000.00 Cash, at the Time of Its Exercise, the Option Was Never Properly Exercised, and We Are Not Concerned With How Much Royalty Payments Have Been Made, or How Royalty Payments Should Be Applied After Exercise. Non Constat It Will Ever Be Exercised.

We agree that an option, during its existence, is a continuing offer in accordance with its terms. Until it is exercised by acceptance, it is not converted into a contract of purchase and sale, and the optionee continues to hold under the lease. All payments of royalties apply as rental only. In order to bring the option into play, it was necessary to comply with its terms, to wit, the payment of $10,000.00 in cash at the time of its exercise.

> "Said owner * * * grants * * * an option * * * to purchase * * * for the sum of $50,000.00 at any time within the period of this lease or any extension of time thereof; provided, this lease shall be in force and effect. Said purchase price shall be payable as follows: Ten Thousand Dollars ($10,000.00) to be paid in cash *at the time of notice* to the first party of the exercising of said option to purchase, and a like sum * * * to be paid on or before the expiration of each and every period of six months thereafter, until said purchase price of $50,000.00 shall be fully paid."

The option does not provide that all rentals or royalties theretofore paid shall be applied on the down payment. If that had been so intended, it could have been easily so stated. To so construe the option, would be to read

something into the contract that is not there. The provision that "that seventy-five per cent (75%) of the royalties and rental payments paid under this lease shall be applied and credited upon the purchase price * * * herein provided to be sold in the event the second parties exercise said option and purchase said property hereunder" can only be reasonably construed to refer to payments made after the exercise of the option. All payments theretofore made were simply rental, and no part of the $50,000.00 purchase price.

In the business world, leases of property with an option to purchase are of frequent occurrence. In practice, until the exercise of the option, rental payments are applied for its use. That is the agreement. The rental compensates for use, but when the option is exercised, the relation of vendor and vendee arises. Then, and not until then, the vendor has agreed to sell, and the vendee has agreed to buy, at the purchase price agreed on. In the instant case, $10,000.00 down, and $10,000.00 every six months thereafter until $50,000.00 shall have been paid. Supposing, at the time of the attempted exercise, more than $50,000.00 had been paid as royalties. Could the lessee demand a deed without further payment? Could it recover the excess paid as rental, as attempted here? Mining operations are frequently carried on under lease and option, but until the option has been exercised, it is usually provided that the royalties should be applied, as rental for the use. When exercised, the rents or royalties are usually applied on the purchase price, because, at that time, the relation is changed from landlord and tenant to that of vendor and purchaser. After that, what was denominated as rental in the lease is converted into

payments on the purchase price. In doing this, we are not doing violence to the language of the agreement and we are not reading something into the option.

> "Contracts of this character, being unilateral in their inception, are construed strictly in favor of the maker, because the other party is not bound to the performance, and is under no obligation to buy, and it is generally held that time is of the essence of the contract, and the conditions imposed must be performed in order to convert the right to buy into a contract of sale."
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> *Winder v. Kenan,* 161 N. C. 628 (633);
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> *Kolachny v. Galbreath,* 26 Okla. 772, 38 L. R. A. (N. S.) 451;
>
> *Landrum v. Jordan,* 229 P. 182.

> "Unilateral contracts or options for the sale of lands are to be construed most strictly in favor of the maker, and the time of performance by the one holding the option is of the essence of the contract, and the conditions imposed must be performed by him in order to convert the right to buy into a contract of sale. The maker has, however, the right to *impose conditions which must be performed precedent to the exercise of the right to buy,* and among these is the payment of the agreed price. The acceptance must be according to the terms of the contract and if these require payment of the purchase money, or any part thereof, precedent to the exercise of the right to buy, the money must be paid or tendered, and a mere notice of an intention to buy, or that the party will take the property, does not change the relation of the parties."
>
> *Winder v. Kenan,* 161 N. C. 628.

"An option contract may be regarded as embodying an offer. When the optionee, or the person to whom the option is made, signifies his desire to accept *in accordance with the terms of the option*, the optionor, or person making the offer, becomes obligated to perform. This acceptance of the offer contained in the option contract is called 'election', and it gives rise to a subsequent contract between the parties to buy or sell, or perform whatever other acts have been specified in the option contract. Penn. Min. Co. v. Smith, 207 Pa. 210, 56 Atl. 426. 'The particular act or acts which constitute an election, may be fixed by the terms of the option as also the time when, the place where, and the person to whom it shall be made.' James, Law of Option Contracts, Secs. 810, 817. *The language of the contract itself controls as to what act or acts constitute an election.*" (Italics ours.)

Flickinger v. Heck, 187 Cal. 111;

Ide v. Lester, 10 Mont. 5, 24 Am. St. 17.

"An 'option', or 'option to purchase' is a contract by which the owner of the property agrees with another person that the latter shall have the right to buy the former's property at a fixed price within a certain time. In such contracts two elements exist: (1) The offer to sell, which does not become a contract until accepted. (2) The completed contract to leave the offer open for the specified time. It is characterized as a unilateral, executed contract, binding only on the optionor, and not on the optionee, and becomes a contract *inter parties* only when exercised or accepted according to its terms. If binding on both parties, it cannot be an option. The owner of the land does not sell his land or any interest in

it, or agree to sell, but he does sell the right or privilege to buy at the option of the other party."

66 *Corp. Juris.* 485, Sec. 12;

13 *Corp. Juris.* 336, Sec. 183.

"And such option contracts must not only be certain and complete, but must be accepted in accordance with its terms. Any acceptance not in accordance with its terms is equivalent to a rejection. Weaver v. Burr, 31 W. V. 736, 8 S. E. 743, 3 L. R. A. 94; Wilkin Mfg. Co. v. Lumber Co. (Mich.), 53 N. W. 1045; Potts v. Whitehead, 23 N. J. Eq. 512."

Couch v. McCoy, 138 Fed. 696 (701);

Pollock v. Brookover, 60 W. Va. 75, 6 L. R. A. (N. S.) 403.

"The very term 'option' indicates choice, not obligation. Such a contract is indeed binding as any contract, but only for what it specifies. As to the optionor who executes the instrument for a consideration, it is an offer made by him to sell upon certain terms which are conditions of his contract, the binding force of which is to restrain him from withdrawing the offer for a certain time. To make it a mutually binding contract, compulsory upon the proposed purchaser, the latter must accept the offer according to its terms. Like any other contract, based on offer and acceptance, *the latter must exactly coincide in all its terms with the former.* Until this occurs there is no meeting of minds between the proposer and the acceptor, and hence no contract other than the original one binding only on the man who makes the offer."

Hartman v. Selling, 97 Or. 368.

"In case of the destruction of the building pending an option to purchase real estate, the optionor need not account to optionee for insurance money which he collects thereon."

Strong v. Moore, 207 Pac. 179 (Or.), 23 A. L. R. 1217.

"It is competent for the optionor to provide in the option that notice of the election shall be given to himself, to a corporation, or to a third person; or to his heirs; that it shall be in writing; the time when, the place where, notice and tender shall be made; and generally, to impose such other conditions as he may desire. These stipulations and provisions are binding upon the optionee, and his election must be in accordance therewith."

James on Option Contracts, Sec. 815, p. 321;

12 *Am. Juris.* 532, Sec. 39.

"As the option must be accepted according to its terms, if by its terms it prescribes certain conditions for its acceptance, such conditions must be performed while the option is still outstanding, unless they are waived, or compliance made impossible by the vendor."

66 *Corp. Juris.* 499, Sec. 23.

"Here the entry was under *an agreement to pay* rent, and the relation of the parties was unquestionably landlord and tenant for twenty years, up to the thirty-first day of October, 1893; and unless the notice of the defendant that he desired to avail himself of the option to purchase had the conclusive effect claimed for it, which we do not think it had, the relation of landlord and tenant is shown, by the evidence aided by the statutory presumption, to have

continued until he completed the purchase. If he had tendered the money, or had announced his ability and willingness to take the property as soon as title could be made, and nothing remained to be done but the order of the court, I can see how it might be claimed with reason that he held as purchaser pending such action. But no such state of facts existed. His notice fails to show a 'payment or tender thereof' of the money which the agreement required should be made 'at the expiration of the term of the lease.' "

Journe v. Hewes, 123 Cal. 244.

II.

Should the Contract Be So Construed as to Require Payment of $10,000.00 to Constitute an Election?

The appellees, California Pacific Title and Trust Company, Title Insurance and Guaranty Company and Byron Halverson, are each trustees, the Title Companies holding the whole title, and Byron Halverson, as a trustee to an undivided one-half of an undivided one-third equitable interest in said mine.

On the 9th day of June, 1937, appellee, California Pacific Title and Trust Company, in reply to the notice of the Mount Gaines Mining Company, purporting to exercise said option, notified appellant that it could not accept the purported election to exercise the option, and that "that said purported notice is of no force or effect and does not constitute an election to exercise said purported option for the reason that the sum of Ten Thousand and no/100 Dollars in cash did not accompany your said notice, the payment thereof as a part of the purchase price being specifically provided for under the terms of said Lease". [Tr. 26.]

After that reply appellant did not undertake to stand on its election. Every month thereafter, or practically so, appellant made payment of royalty as rental to the Trustee, and the Trustee from time to time, disbursed the royalties to its beneficiaries. Does not this show that appellant acquiesced in that construction? Ever since that time, the royalties have been paid, and received, under that construction.

If appellant were right in its contention, did it not waive its "election" or purported election? And did not the continued payment under the lease amount to an acceptance of the construction placed on the option by the Title Company? Did not that constitute a practical construction?

13 *Corp. Juris.* 546, Sec. 517.

And would not appellant be estopped now, after a period of nearly five years, from claiming that the option had been exercised? Appellant stood by, permitting the royalties to be disbursed, without asserting its rights, under the purported election. 23 *C. J.* 1150, Secs. 154-155. In case of controversy, timely assertion of right is always required. There is only one conclusion: Appellant accepted the Title Companies' contention, waiving its own contention.

However, we submit that the option was never exercised and that the judgment of the Court below should be affirmed, with costs.

Respectfully submitted,

HALVERSON & HALVERSON,

By GEORGE HALVERSON,

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